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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JAMES L. REYNOLDS, JR, HOWARD M. SCHMALZ, LYDIA SCHMALZ, AND JOHN F. LANGE,

Petitioners,

v.

CITY OF NEW ORLEANS, THROUGH ITS OFFICE OF EMERGENCY PREPAREDNESS, TERRY EBBERT, DIRECTOR OF THE ORLEANS PARISH OFFICE OF EMERGENCY PREPAREDNESS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY.

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Was the September 6, 2005 forced evacuation proclamation of the Mayor of New Orleans an unconstitutional and exclusively city policy within the meaning of 42 U.S.C. § 1983 that was the proximate cause of the arrest of John F. Lange on September 8, 2005 without probable cause or any cause other than the Mayor's Proclamation and his attempted forced evacuation?

2. Did the September 6 2005 forced evacuation order cause the unconstitutional arrest, searches, and seizures as alleged by the plaintiffs?

3. Did the arrest and involuntary removal of John F. Lange from his home at gunpoint and without probable cause and his being taken into custody constitute an arrest even though he was subsequently set free by the National Guard, although warned that he could be rearrested by the city police.

4. Do the plaintiffs have standing to challenge future application of the city policy of forced evacuation, whether or not the proclamation is still technically in force, in that the city has not repented, and there is no reason to believe that forced evacuation would not be repeated in the event of another hurricane or other natural catastrophe?

RULE 10 REVIEW ON CERTIORARI

There is a conflict between the decision of the Court of Appeal for the 5th Circuit in this case and the decisions of the 9th Circuit Courts of Appeal in *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir.1989) and *Truth v. Kent School Dist.*, 524 F.3d 957 (9th Cir. 2008) and decisions of this Court in *Monell v. Department of Social Services*, 436 US 658 (1978); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Kaupp v. Texas*, 538 U.S. 626 (2003), *California v. Hodari D.*, 499 U.S. 621 (1991); *United State v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Welch v. Wisconsin*, 466 U.S. 740, 750 (1984); and *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997) regarding the application of 42 U.S.C. § 1983 to the forced evacuation proclamation of September 6, 2005 and the arrests and seizures consequent thereto.

This matter also involves a question of exceptional importance: May a city, with or without the imposition of martial law, who has issued a proclamation that provides "any public safety officer within the boundaries of the Parish of Orleans . . . is hereby instructed and authorized to compel the evacuation of all persons from the City of New Orleans, regardless of whether such persons are on private property or do not desire to leave, . . .," not be responsible for the damages and unconstitutional consequences of arrests without probably causes, illegal entries on private property, and seizures of persons and property by public safety officers within the Parish of Orleans, whether or not they are city police.

RULE 14.1 STATEMENT

Petitioners (plaintiffs-appellants below) are James L. Reynolds Jr., Howard M. and Lydia Schmalz and John F. Lange.

Respondents (defendants-appellees below) are City of New Orleans, through its Office of Emergency Preparedness, and Terry Ebert, Director of the Orleans Parish Office of Emergency Preparedness, individually and his official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James L. Reynolds Jr., Howard M. and Lydia Schmalz, and John F. Lange, respectfully petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Reynolds v. New Orleans City*, 2008 U.S. App. LEXIS 6969 (App. A, p.1a-20a). The judgment of the district court of October 10, 2006 (App. B, p.21a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The original complaint was filed on September 12, 2005 [Dkt.-1-R-12-20], thirteen days after Katrina. It demanded injunctive relief against the continuation of warrantless searches, seizures, and arrests and other ongoing violations of the Fourth and Fifth Amendments. There was a hearing on that date in which the district court expressed doubt that a federal question had been alleged and denied all relief. On September 19, 2005, plaintiffs filed a first amended complaint [Dkt.-12-R-69-79] and a substantial memorandum [Dkt.-8-R-48-68] addressing the concerns dictated into the record by the district court on September 12. On September 27, 2005, the allegedly unconstitutional practices appearing to

have ceased, it was agreed that the case could proceed by ordinary process [Dkt.-13-R-98-99].

On January 3, 2006, defendants finally filed their answer and a motion for sanctions. A scheduling conference was held on January 23, 2006 with a trial date of November 13, 2006 being set.

Plaintiffs filed a second amended complaint adding John F. Lange as a plaintiff and substituting for previous complaints [Dkt.-29-R-203-215]. Plaintiffs also responded to the Rule 11 sanctions motion filed by defendants [Dkt.-26-R-178-198]. The defendants' unopposed motion to continue the hearing was denied as moot, the district court finding the motion for sanctions to be premature.

On February 13, 2006, plaintiffs filed a motion for partial summary judgment [Dkt.-34-R-253-276] with John Lange's affidavit accompanying the supporting memorandum [Dkt.-34-R-277-281-RE-10]. The motion was denied on March 17, 2006, the district court finding there to be unspecified issues of fact [Dkt.-51-R-401-RE-8] that presumably should have resulted in the denial of any party's motion for summary judgment. On March 27, 2006 plaintiffs filed a motion to file the affidavit of James G. Delery [Dkt.-58-R-422-429-RE-11] which was denied on March 29, 2006 [Dkt.-59-R-431].

Plaintiffs filed their motion to certify class action and supporting memorandum [Dkt.-39-R-222-247]. The district court denied the motion on March 29, 2006 [Dkt.- 57-R-471-501-RE-3], finding, *inter alia*, no overall constitutional violations had been alleged and that the legal and factual issues were too individual for class treatment.

Plaintiffs propounded extensive written discovery, which was not adequately answered or

responded to properly. The City did admit that others had been allowed into the City, whereas plaintiffs' requests had been denied. On account of that lack of response, plaintiffs asked for and reiterated requests for deposition dates. After substantial effort and after several discovery conferences in which no dates were forthcoming, these depositions were set *ex parte* on September 19, 2006, within the discovery period, and a corporate and individual deposition notice filed with the district court [Dkt.-66-R-539-554-RE-9]. These depositions, which would have established proximate cause, did not take place because of the prior filing of a motion for protective order and the refusal of the defendants to produce either documents or witnesses.

The deposition discovery sought to reveal the true facts of the evacuation orders, to prove that the defendants knew, should have known, or took no steps to learn whether or not state law would excuse clearly established constitutional violations such as warrantless arrests from persons' homes without probable cause and illegal searches and seizures, and to prove that these arrests and seizures were the direct result of September 6, 2005 Proclamation. The deposition notice [Dkt.-66-R-539-554-RE-9] was directed to the City of New Orleans and included the individual depositions of C. Ray Nagin, Terry Ebbert, Louis Reese, and Sherry Landry, the main actors for the City and the persons allegedly responsible for the drafting and implementation of the forced evacuation order and arrests and seizures of persons and property without probable cause and illegal entry on private property that followed and to identify specific instances of denials of equal protection. Attached to

the notice was a substantial list of documents, most of which had been previously requested, the previous requests not having been properly responded to.

Defendants hand filed their motion for protective order and a memorandum in support [Dkt.-64-R-502-510] and the motion for judgment on the pleadings or for summary judgment [Dkt.-63-R-439-450] on September 12, 2006. It was docketed only on September 15, when it was placed on electronic filing [App. D], so that plaintiffs received notice less than 15 days prior to the hearing date of September 26, 2006, a violation of the Eastern District local rule[1] which require 15 days actual notice prior to the hearing date. After filing a motion to continue on account of the untimeliness of the motion, which was denied [Dkt.-67-R-531-535], plaintiffs filed a motion to defer and a supporting memorandum [Dkt.-77-R-581-607], including a response to the motion for protective order that considered both substantive and procedural issues, and a substantial opposition [Dkt.-87-R-660-690]. Plaintiffs requested oral argument. On September 21, 2006, plaintiffs' motion to continue the motion for protective order [Dkt.-70-R-571-RE-4] and the motion for judgment on pleadings and/or summary judgment [Dkt.-72-R-573-

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[1] LR7.2E Setting Motions for Hearing

Counsel filing a motion shall, at the time of filing, notice it for hearing within a reasonable time thereafter. Unless otherwise ordered by a judge in a particular case, motions must be filed not later than the fifteenth day preceding the notice hearing date and **at least fifteen days actual notice of hearing must be given to opposing counsel** whether notice is served by mail or delivery under FRCvP 5(b). Copies of the motion and memorandum in support thereof shall also be served with such notice of hearing.

RE-5] were denied. Plaintiffs successfully filed a complete memorandum and an opposition to the statement of uncontested facts that included a statement of material facts in controversy.

Summary judgment was granted on October 10, 2006 in a three page opinion [Dkt.-80-R-700-703-RE-6] that cited **no** law and promised further written reasons which were never forthcoming. A notice of appeal was filed on October 18, 2006 [Dkt.-82-R-741-742-RE-2]. A final judgment [Dkt.-90-R-596-RE-7] was entered of January 29, 2007 apparently because someone from the Fifth Circuit noted the lack of a final judgment.

In its opinion of April 1, 2008 [App. A, p.1a-20a], the Fifth Circuit affirmed the judgment that granted the summary judgment motion filed by the defendants. The court considered the plaintiffs' claim for injunctive claims and declaratory relief to be moot because the forced evacuation proclamation was no longer in effect. Moreover the court found that plaintiffs had failed to demonstrate a constitutional violation of the Fourth Amendment. In regard to Lange's Fourth Amendment claims, the court concluded that summary judgment was proper because Lange failed to demonstrate that his injury occurred on account of a municipal policy or custom, *i.e.*, a lack of proximate cause. The 5th Circuit also vacillated as to whether or not there had been an arrest and whether or not the arrest was part of a forced evacuation because Lange was permitted by the National Guard to leave the Convention Center to which he had been taken to be involuntarily evacuated.

According to Lange's affidavit, App. D, he was required to leave his home because a Louisiana state

trooper entered his home with a drawn gun, placed his hands on him, and ordered him to come with him. Lange, meanwhile protesting, was placed on a National Guard truck with other protesting persons and driven to the Morial Convention Center for involuntary evacuation. He was set free because he asked a national guardsman whether he was under arrest and was told that he was not, but that he could be arrested if the city police saw him. Lange returned to his home and stayed in hiding until the forced evacuation order was no longer enforced.

STATEMENT OF ISSUES PRESENTED

1. Was it appropriate for the court below to affirm a grant of summary judgment based on a lack of material factual issues in dispute as to proximate cause when the provenance of the evacuation proclamation, its alleged unconstitutionality, and the causation of Lange's arrest would have been exhaustively probed in deposition discovery that was prevented by a district court that promised to explain its reasoning but which never did so?

2. Considering that the September 6, 2005 forced evacuation proclamation was promulgated by the Mayor of New Orleans, an official with policymaking authority, should the court of appeal have considered this proclamation as an official municipal policy within *Monell*?

3. Considering the date of the forced evacuation proclamation and the immediacy of the existence of this municipal policy and the arrest and seizure of John Lange, was it not obvious that the forced evacuation proclamation was the moving force behind these constitutional violations?

4. Considering that the September 6, 2005

evacuation proclamation was an official policy issued *ex parte* by the City of New Orleans, which could be reissued or reimposed at any time in the future, should the court of appeal have denied plaintiffs any ability to challenge it by declaratory judgment?

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit Court of Appeals holding that the plaintiffs did not demonstrate that that the unconstitutional seizure and arrest of John Lange was proximately caused by the forced-evacuation proclamation and that plaintiffs are not entitled to challenge the September 6, 2005 forced evacuation proclamation under 42 U.S.C. § 1983 by declaratory judgment conflicts with principles established by other circuits and by the United State Supreme Court.

I.
THE SEPTEMBER 6, 2005 FORCED EVACUATION PROCLAMATION WAS THE PROXIMATE CAUSE OF THE CONSTITUTIONAL VIOLATIONS

42 U.S.C. § 1983 states:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A. The September 6, 2005 Forced Evacuation Order Constitutes Municipal Policy for Purposes of Determining Responsibility Under 42 U.S.C. § 1983

The seminal case on what constitutes a local government unit's policy or custom for purposes of determining liability under 42 U.S.C. § 1983 is *Monell v. Department of Social Services*, 436 US 658, 690-691 (1978), to wit:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970): "Congress included customs and usages

[in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken v. Bradley,* 433 U.S. 267, 291, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977); see *Ex parte Virginia,* 100 U.S., at 347-348, 25 L.Ed. 676. For this reason, *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, *e. g., Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Lincoln County v. Luning,* 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes.

Since official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent-at least where Eleventh Amendment considerations do not control analysis-our

> holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.
>
> See also Mr. Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940): "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not writ an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.

That actions of officials or bodies acting within the scope of their policymaking authority constitute policies or customs for purposes of determining liability of local government units under 42 U.S.C. § 1983 meant that the September 6, 2005 forced evacuation proclamation issued by the Mayor of New Orleans, obviously an official of the City, constituted municipal action under *Monell.*

Since it is conceded by defendants that this proclamation was within the scope of Mayor Nagin's policymaking authority pursuant to La. R.S. 29:727 is conceded by defendants, it is clearly an official policy within 42 U.S.C. § 1983 as the court of appeals

seems to admit when it qualified this proclamation as an "order".

In order to be entitled to relief under 42 U.S.C. § 1983, in addition to the presence of an official policy, the plaintiffs also had to demonstrate that the official caused a deprivation of a right, privilege or immunity secured by the Constitution or a law of the United States.

Here, these conditions are met. The actions of Trooper Boyd directed against Lange were unconstitutional and were authorized, caused by, and the result of and followed immediately after the forced evacuation proclamation.

B. The State Trooper's Actions Against Lange Violated the Fourth Amendment

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

On September 8, 2005, John F. Lange was arrested at his home without probable cause or any other valid cause. According to Lange's affidavit (App. D, p. 26a-30a), a Louisiana state trooper that day entered his property and forced him, by intimidating him with an unholstered gun, to follow him off of his [Lange's] property and into a National Guard vehicle to be taken with other protesting American citizens to the Morial Convention Center for involuntary evacuation out of the city. This arrest

was made in presence of California Highway Patrol officers.

In its decision of April 1, 2008 (App. A, p. 1a-20a) the court held that Lange was not arrested because, after a "brief detention," he was released and was permitted to returned to his home. This holding is contradicted by Lange's affidavit which clearly establishes circumstances in which an arrest occurred that violated the Fourth amendment. The fact that he was released was fortuitous and simply demonstrates that someone understood the obvious unconstitutional ramifications of an arrest for the purpose of forced evacuations.

In *United States v. Mendenhall,* 446 U.S. 544, 553 (1980), this Court:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained.

On the authority of *Mendenhall,* this Court stated in *Florida v. Bostick*, 501 U.S. 429, 437 (1991) that a seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when:

> taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

In *Kaupp v. Texas*, 538 U.S. 626, 631 (2003), the Court considered that a 17 years old boy was arrested when he was awakened in his bedroom at 3 in the morning by at least three police officers and taken out in handcuffs, without shoes, dressed only in his underwear, was driven to the scene of crime

and then to the sheriff's offices where he was taken into an interrogatories room and questioned.

In *California v. Hodari D.*, 499 U.S. 621, 627-628 (1991), this Court gave several "examples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." The threat of legal action also can indicate a seizure (*Dejesus v. Village of Pelham Manor*, 282 F. Supp. 2d 162, 170-171 (S.D.N.Y. 2003)).

While the Fourth Amendment concerns arrest to be the "quintessential seizure of the person" (*California v. Hodari D.*, 499 U.S. 621, at 621 (1991), the Fourth amendment also governs seizures that involve only brief detention (*United State v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

Physical entry of the home is the chief evil that the wording of the Fourth Amendment is designed to prevent. Accordingly, any seizure inside a home carries a presumption of unreasonableness (*Welch v. Wisconsin*, 466 U.S. 740, 750 (1984).

Here, according to the Lange affidavit (App. D, p. 26a-30a), his seizure/arrest occurred on his private property, in presence of several officers, with the display of a weapon and with some physical touching of his person.

Accoordingly, Lange's arrest constitutes an unequivocal violation of the Fourth Amendment.

C. The September 6, 2005 Forced Evacuation Proclamation Resulted in Lange's Arrest and Seizure

The court of appeal concluded that plaintiffs failed to demonstrate that "Lange's injury occurred pursuant to a municipal policy or custom" because the record "contains no evidence that the City had a policy authorizing law enforcement to unlawfully search and detain people within the City.(App. A, p.16a and 17a)

Monell v. Department of Social Services, 436 US 658 (1978), establishes that such a causal link can be proved by demonstrating that the municipal policy is the "moving force" behind the deprivation. It means that the entity's policy must have played a part in the constitutional violation.

In *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 400 (1997), this Court held that action taken or directed by a municipality or its authorized decision maker itself violates federal law will also determine that municipal action was moving force behind injury of which plaintiff complains.

The language of the September 6, 2005 proclamation "authorized [law enforcement] to compel the evacuation of all persons from the City of New Orleans, regardless of whether such person are on private property or do not desire to leave" constituted an instruction, authorization, and invitation to military and law enforcement personnel to make illegal and warrantless searches and seizures and arrests of citizens of New Orleans without any standards of conduct, probable cause, or any other consideration of the liberty or property interests of the persons so arrested or whose property was searched and seized.

The unconstitutional actions committed by the State Trooper were "directed" by the municipal

proclamation of September 2006 within *Monell* and *Board of County Com'rs of Bryan County,* since the municipal policy was the moving force behind the violations of the Fourth Amendment.

Moreover, the Fourth Amendment violations, which received widespread media attention and national television coverage, began immediately after the proclamation of the evacuation order, which also demonstrates that the illegal arrests resulted from the evacuation order. This would have been demonstrated beyond contradiction had discovery not been prevented.

II.
PLAINTIFFS MAY CHALLENGE FUTURE APPLICATION OF THE SEPTEMBER 6, 2005 FORCED EVACUATION PROCLAMATION

The court of appeals held that that the plaintiffs were not entitled to challenge this official policy because it was no longer in effect.

However, on Account of the General Applicability of the Policy Articulated in the September 6, 2005 Forced Evacuation Order, the Plaintiffs Are Entitled to Seek Prospective Relief

Inasmuch as the language of the forced evacuation proclamation defining the means appropriate to implement forced evacuation is unrestricted, the City of New Orleans, particularly after the approval by the court of appeals, feels free to and would undoubtedly use the same tactic in the event of another hurricane. This means that the plaintiffs have standing to seek prospective relief for this deprivation of rights in the event of a hurricane or other disaster.

In *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989), involving recipients of governmental benefits grounded on § 1983, challenging constitutionality of Idaho's post judgment garnishment procedure, the 9th Circuit stated:

> We conclude that the *Monell* doctrine did not intend to limit the reach of plaintiffs seeking **prospective relief under § 1983** against the further exercise of governmental authority under an allegedly unconstitutional state statute. The availability of such relief is "necessary to permit the vindication of important federal rights." *Cf. Hoohuli*, 741 F.2d at 1176. We conclude that the court erred in applying *Monell* and its progeny to the facts presented here.

In *Truth v. Kent School Dist.*, 524 F.3d 957, 967 (9th Cir. 2008), the court reaffirmed that *Monell*'s requirement that plaintiffs in § 1983 actions show that their injuries resulted from execution of a governmental policy or custom does not apply where plaintiffs only seek prospective relief.

The court below should not have denied plaintiffs' claim for declaratory relief because the "order is no longer in effect," because prospective relief may be sought, as here, in the event of a future hurricane. Accordingly, plaintiffs were and are still entitled to challenge this official policy inasmuch as it constitutes a serious deprivation of constitutional rights and will cause damage and injury in the future unless its unconstitutionality it declared.

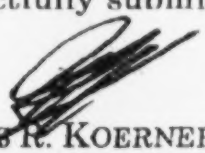
CONCLUSION

Hurricane Katrina was an unprecedented catastrophe causing widespread destruction and untold misery. The forced evacuation proclamation of September 6, 2005, more than a week after landfall and after the City had been secured by the National Guard and thousands of volunteer law personnel, was an invitation to unconstitutional action that was irresistible.

Katrina will also constitute an unprecedented constitutional tragedy if the unconstitutional actions in its wake that were authorized by an ineffective and ill-advised city government were effectively immunized, and citizens of the United States of America are prevented from seeking declaratory relief against repetition and even perpetuation.

The petition for writ of certiorari should be granted.

Respectfully submitted.



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JUNE 26TH, 2008

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT FILED APRIL 1, 2008

JAMES L. REYNOLDS, JR.; HOWARD M. SCHMALZ; LYDIA SCHMALZ, Individually and on behalf of all others similarly situated; JOHN F. LANGE, Plaintiffs-Appellants, v. NEW ORLEANS CITY, through its Office of Emergency Preparedness; TERRY EBBERT, Director of the Orleans Parish Office of Emergency Preparedness, Individually and in his Official Capacity, Defendants-Appellees,

No. 06-31122

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2008 U.S. App. LEXIS 6969

April 1, 2008, Filed

JUDGES: Before REAVLEY, STEWART, and OWEN, Circuit Judges.

OPINION

PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This suit arises from the aftermath of the Hurricane Katrina disaster. Plaintiffs-Appellants James Reynolds, Howard Schmalz, Lydia Schmalz, and John Lange (collectively "Plaintiffs") claim that the City of New Orleans ("City") and Terry Ebbert, Director of the Orleans Parish Office of Emergency Preparedness (collectively "Defendants"), [*2] violated several of their constitutional rights in

promulgating and enforcing a mandatory evacuation order in the wake of the hurricane. Finding no reversible error in the district court's grant of summary judgment to the Defendants, denial of the Plaintiffs' request for a continuance, and denial of the Plaintiffs' motion for class certification, we affirm.

I. Factual and Procedural Background

Hurricane Katrina struck New Orleans and the surrounding areas on August 29, 2005. The destruction was monumental, with much of the city left under water. Following the hurricane, with police officers and National Guard troops focusing on saving lives, looting and crime were rampant. *See* Robert D. McFadden and Ralph Blumenthal, *Higher Death Toll Seen; Police Ordered to Stop Looters*, N.Y. Times, Sept. 1, 2005, at A1. On September 6, the Mayor of New Orleans issued the following evacuation order (hereinafter "Order"):

> Whereas, Hurricane Katrina has caused catastrophic damage to the City of New Orleans, including, without limitation, several breaches in the levee system, loss of power and water service, and the collapse and/or loss of structural integrity of roadways, buildings, and other structures, [*3]
>
> Whereas, the above-referenced damage necessitates an immediate and unimpeded recovery effort by the City, the State of Louisiana, and the United States Government,
>
> Whereas, the presence of individuals not specifically engaged by the City, State,

or U.S. Government to assist in the remediation and recovery effort would distract, impede, or divert essential resources from the recovery effort,

Now, therefore, I as the Mayor of the City of New Orleans, pursuant to the authority granted by Louisiana Revised Statutes 29:727 and 730.2, do hereby promulgate and issue the following mandatory evacuation order, which shall supercede the Order issued by me on August 28, 2005, which shall remain in effect for thirty days from this date, unless extended by my order or earlier terminated by my order:

Effective immediately, any public safety officer within the boundaries of the Parish of Orleans, including, without limitation, members of the New Orleans, including, without limitation, members of the New Orleans Police Department, the New Orleans Fire Department, the National Guard and any branch of the U.S. Military, is hereby instructed and authorized to compel the evacuation of all persons from the [*4] City of New Orleans, regardless of whether such persons are on private property or do not desire to leave, unless such persons are determined by such public safety officers to be specifically engaged by the City, the State or the U. S. Government in providing assistance in the remediation and recovery effort.

> Those persons who are currently located in Algiers on the West Bank side of Orleans Parish are hereby excepted from this Order. Plaintiffs were all residents of New Orleans at the time of Hurricane Katrina who were either prevented from returning to their property or forcibly evacuated under the Order.

Plaintiff James L. Reynolds, Jr. owns a home in New Orleans that was unaffected by Hurricane Katrina and the subsequent flooding. On September 1, 2005 he left his home, and was prevented from returning to his home and his property. Plaintiffs Howard and Linda Schmalz also own a home in New Orleans that was unaffected by flooding. They evacuated prior to the hurricane, and were not able to return to their home due to the Order. Plaintiff John F. Lange remained in his New Orleans home after the hurricane struck. He had no trouble with looters, and he had transportation and adequate [*5] food and water. On September 8, 2005, a Louisiana state trooper and seven California Highway Patrol Officers entered Lange's property and told Lange that he had to come with them. Lange was not arrested, but was taken in an Army truck to the New Orleans Convention Center. There, the military searched his person and subsequently released him back into the city. Lange returned to his home and was not bothered again. By September 27, 2005, all Plaintiffs had been allowed reasonable access to their properties. [1]

James Reynolds, Howard Schmalz, and Lydia Schmalz filed the present lawsuit against the City of New Orleans and Terry Ebbert, Director of the

Orleans Parish Office of Emergency Preparedness, in federal district court on September 12, 2005. They amended their complaint on January 24, 2006 to add Lange as a plaintiff. As amended, the complaint alleged that Defendants' actions in evacuating Reynolds and the Schmalzes and preventing them from returning to their property denied the Plaintiffs equal protection, procedural due process, and substantive due process under the Constitution. The complaint also alleged that Lange was subject to unconstitutional searches and seizures. On February [*6] 8, 2006, the Plaintiffs moved to certify two classes of plaintiffs. The first class would be composed of individuals who, like Reynolds and the Schmalzes, suffered property loss as a result of being denied entry to New Orleans after the storm. The second class would contain members who, like Lange, reside in areas that were not flooded by the hurricane. These members allegedly suffered illegal searches and seizures stemming from the enforcement of the Order. The district court denied to motion to certify on March 29, 2006, finding the class definition illogical and unworkable and also finding that the class representatives' claims were not necessarily typical and did not adequately represent the proposed class. The Plaintiffs did not seek interlocutory review of this ruling.

1 For a more comprehensive discussion of the perilous conditions and immense challenges facing property owners in the aftermath of the hurricane, see Michael Cook, *Note: "Get Out Now or Risk Being Taken Out by Force": Judicial Review of State Government Emergency Power Following a Natural Disaster*, 57 Case W. Res. 265, 265-68 (2006).

At this point, the only claims remaining before the district court were the Plaintiffs' [*7] individual claims. On September 19, 2006, the Defendants filed a "Motion for Judgment on the Pleadings Pursuant to Rule 12(c) or, Alternatively, for Summary Judgment Pursuant to Rule 56" with respect to these claims. On September 26, 2006, the Plaintiffs filed a motion to defer hearing of Defendants' motion; Plaintiffs argued that additional discovery was needed. Plaintiffs also filed an opposition to the motion for summary judgment. On October 10, 2006, the district court granted Defendants' motion, finding that "no material fact issues are in dispute that preclude summary judgment or, alternatively, the granting of the motion for judgment on the pleadings." The district court also denied as moot the Plaintiffs' motion for a continuance. Plaintiffs filed a timely notice of appeal, appealing the denial of class certification, the district court's grant of Defendants' motion for judgment on the pleadings or summary judgment, as well as the denial of their motion for a continuance.

II. District Court's Dismissal of Plaintiff's Claims

Initially, we note that we are construing the district court's October 10, 2006 Order as a grant of summary judgment to the Defendants, rather than a judgment [*8] on the pleadings, because it appears that the district court considered matters outside of the pleadings in dismissing the Plaintiffs' claims. *See, e.g.*, *Bolen v. Dengel*, 340 F.3d 300, 312 (5th Cir. 2003) (construing district court's order as grant of summary judgment because the district court did not exclude an affidavit which was outside of the submitted pleadings). [2]

2 Thus, in evaluating Plaintiffs' appeal, we may only consider the evidence present in the summary judgment record. Here, the record contains two affidavits submitted by Plaintiffs: (1) Lange's affidavit, which was submitted in support of Plaintiffs' own motion for summary judgment; and (2) the affidavit of James Delery, not a named party in this lawsuit, which was submitted in support of Plaintiff's motion for class certification. There had been no depositions yet taken in the case, and the district judge did not receive testimony at the summary judgment hearing.

This Court reviews the district court's grant of summary judgment de novo, applying the same standards as the district court. *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002). Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when [*9] the record discloses that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Defendants, the moving parties, bore the initial burden of "informing the District Court of the basis for [their] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which [they] believe[] demonstrate the absence of a genuine issue of material fact." *Celotex*, 417 U.S. at 323. Once Defendants' burden was met, the burden shifted to Plaintiffs, the nonmovants, to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air*

Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). "Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002).

Plaintiffs' constitutional claims arise under 42 U.S.C. § 1983. To state a claim [*10] pursuant to § 1983, a plaintiff must claim a violation of a right secured by the Constitution or laws of the United States and demonstrate the alleged deprivation was committed by a person acting under color of state law. *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997). Plaintiffs brought suit against the City, as well as against Ebbert. A municipality may be held liable under § 1983 when its official policies or customs violate the Constitution. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The plaintiff must identify the specific policy or custom, and show that the final policy maker, through its "deliberate conduct," was the "moving force" behind the violation. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Plaintiffs also sued Ebbert, in both his individual and official capacity. This Court has explained that official-capacity suits should be treated as suits against the government entity, *see, e.g., Turner v. Houma Mun. Fire and Police Civil Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000); therefore, Plaintiffs' claims against Ebbert in his official capacity merge with their claims against the City.

A. Claims for [*11] Injunctive and Declaratory Relief

As the Order is no longer in effect, the Plaintiffs' claims for injunctive and declaratory relief are moot. *See Houston Chronicle Publ. Co. v. City of League City*, 488 F.3d 613, 619 (5th Cir. 2007) (holding that disputes concerning repealed legislation are "generally moot"). [3] The district court's dismissal of these claims was not in error.

> 3 An important exception to this general rule applies if there is a substantial likelihood that the challenged statute will be reenacted or replaced by another constitutionally suspect law. *See, e.g., City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). Plaintiffs have not alleged that this exception applies, and in any event, given the unique circumstances that necessitated the Order, such exception would not apply.

B. State Law Claims

On appeal, Plaintiffs cite to numerous provisions of the Louisiana Constitution in support of their claims. Because Plaintiffs failed to adequately raise these arguments before the district court, these arguments cannot provide a basis for reversing the district court's grant of summary judgment. *See Pluet v. Frazier*, 355 F.3d 381, 385 (5th Cir. 2004) ("We will not disturb the district [*12] court's judgment based upon an argument presented for the first time on appeal."). To the extent that Plaintiffs are arguing that their complaint contains claims arising from the Louisiana Constitution, Plaintiffs failed to adequately plead these claims in their complaint, as the complaint fails to cite to any Louisiana law as a basis for relief. *See* FED. R. CIV. P. 8(a)(2).

C. Equal Protection Claim

In their complaint, Plaintiffs allege that Reynolds and the Schmalzes were denied equal protection of the law in violation of the United States Constitution

because the Order was applied unequally - some people were refused access to their homes while others were allowed to return.

On appeal, other than mentioning that the Orders were "not enforced equally," Plaintiffs' briefs do not discuss an equal protection claim. [4] "We will not raise and discuss legal issues that [an appellant] has failed to assert." *Brinkmann v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *see also* FED. R. APP. P. 28(a). The mere mention of a claim that has been appealed does not constitute a supported argument or adequate briefing, nor does it preserve the issue for review, so this issue is waived. *See, e.g., Castro v. McCord*, No. 05-21034, 2007 U.S. App. LEXIS 29277, at *4 (5th Cir. Dec. 17, 2007) [*13] (holding that a party "waives an issue if he fails to adequately brief it"); *In re Texas Mortg. Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985)("[I]ssues not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals.").

4 In fact, the only discussion of unequal enforcement of the Orders is located in the "Substantive Due Process" section of Plaintiffs' brief. There is no argument section pertaining to an equal protection claim, nor is equal protection even mentioned in Plaintiffs' briefs.

D. Procedural Due Process Claim

Plaintiffs raise two separate procedural due process claims. First, they contend that Plaintiffs

were entitled to a hearing prior to the City's depriving them of the use of their property through the Order and that they should have been given an opportunity to appeal the denial of their requests for re-entry to the City. Second, they argue that Lange's arrest constituted an unconstitutional deprivation of his liberty interests. We will address each of these claims in turn.

With respect to the first of Plaintiffs' procedural due process claims, the claims based on the denial of access [*14] to their properties, the Plaintiffs have failed to point to any competent evidence in the record supporting this claim. In support of their opposition to summary judgment, Plaintiffs merely restated the allegations set forth in the complaint - that Plaintiffs' were unconstitutionally denied access to their property in the immediate aftermath of the hurricane. Plaintiffs did not submit any affidavits detailing the alleged denials of due process, nor did Plaintiffs point to any evidence in the record supporting the allegations stated in their complaint and set forth in their opposition to summary judgment. This Court has made clear that "unsubstantiated assertions are not competent summary judgment evidence . . . In response to motions for summary judgment, it is incumbent upon the non-moving party to present evidence - not just conjecture and speculation - to support each element of the claim." *Lewallen v. ConMed Corp.*, No. 07-50768, 2008 U.S. App. LEXIS 394, 5-6 (5th Cir. 2008) (citing *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996)). As such, the district court's grant of summary judgment to the Defendants was proper.

Plaintiffs' second [*15] procedural due process claim arises from Lange's arrest and detention. The record contains Lange's affidavit, which indicates that on September 8, 2005, Lange was ordered by a Louisiana state trooper to vacate his residence and to accompany the trooper to the New Orleans Convention Center. Lange was not arrested, and after a brief detention was released and returned to his home. On appeal, Plaintiffs argue that Lange was entitled to some sort of process prior to the actions which deprived him of his liberty; Plaintiffs do not, however, specify what level of judicial process Lange was entitled to. Essentially, Lange appears to be claiming that his constitutional rights were violated when he was detained without either a pre-detention probable cause determination or a prompt post-detention probable cause hearing. *See Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)(holding that Fourth Amendment requires that determination of probable cause "be made by a judicial officer either before or promptly after arrest"). This allegation properly invokes the protections of the Fourth Amendment; not the due process clause of the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) [*16] (holding that "[w]hen a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims"); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) ("[C]onstitutional claims must be addressed under the most applicable provision."); *Becker v. Kroll*, 494 F.3d 904, 920 (10th

Cir. 2007) (holding that "the Fourth Amendment adequately protected [plaintiff's] constitutional liberty interests, and she therefore has no procedural due process claim based on pre-trial deprivations of physical liberty"); *Larson v. Neimi*, 9 F.3d 1397, 1402 (9th Cir. 1993) ("[I]n actions for the unconstitutional seizure of persons by officials, liability will be determined under the specific standards of the Fourth Amendment rather than under the general due process standards of the Fourteenth Amendment."). As such, the district court properly dismissed any procedural due process claims relating to Lange's detention.

E. Substantive Due Process Claim

Plaintiffs raise two arguments as to why the Order violated their substantive due [*17] process. First, they argue that the order was enforced unequally, arbitrarily, and discriminatorily. Second, they argue that the order was void for vagueness.

To the extent that Plaintiffs allege a substantive due process violation based on unequal enforcement of the Order, this claim is not supported by any evidence in the summary judgment record. As noted above, Plaintiffs did not provide any affidavits or other competent summary judgment evidence indicating that they did, in fact, experience unequal enforcement of the Order. Their opposition brief merely restated the unsupported allegations set forth in their complaint; this is not sufficient to defeat summary judgment. Further, even had Plaintiffs provided adequate summary judgment evidence of unequal enforcement and injuries stemming from such enforcement, their claim would fail. Substantive due process "bars certain arbitrary, wrongful government actions regardless of the fairness of the

procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (internal citations omitted). As this Court previously observed, "[t]he Supreme Court's discussions of abusive executive action have repeatedly emphasized that 'only [*18] the most egregious official conduct can be said to be arbitrary in the constitutional sense.'" *McClendon v. City of Columbia*, 305 F.3d 314, 325 (5th Cir. 2002) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). The plaintiff must therefore demonstrate that the abuse of power by the state official "shocks the conscience." *Id.* at 326 (quoting *County of Sacramento*, 523 U.S. at 846). Here, even if the City granted access unequally, this decision was not so arbitrary as to "shock the conscience," especially given the circumstances surrounding enforcement of the Order. As such, Plaintiffs do not state a viable substantive due process claim and the district court did not err in dismissing this claim.

Plaintiffs also argue that the Order was unconstitutionally vague. The Fourteenth Amendment's guarantee of Due Process proscribes laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001) (citing *Smith v. Goguen*, 415 U.S. 566, 572, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)). However, as the Order has been repealed, this facial challenge to the statute is moot. *See, e.g., Nat'l Mining Ass'n v. United States DOI*, 346 U.S. App. D.C. 192, 251 F.3d 1007 (D.C. Cir. 2001) [*19] (holding that because regulations had been amended the plaintiff's vagueness challenge

was moot and any opinion regarding the former regulations would be merely advisory); *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed.").

F. Fourth Amendment Claim

The summary judgment record contains evidence relating to only one possible Fourth Amendment claim - the arrest and detention of Lange. The summary judgment record contains no evidence that any of the other Plaintiffs were subjected to illegal searches and seizures; in fact, by their own admissions, the other Plaintiffs were not even present in the City during the period that the Order was allegedly enforced through the illegal searches and seizures.

With respect to Lange's Fourth Amendment claim, the record contains Lange's affidavit, which sets forth the following facts and circumstances of his detention. The affidavit indicates that on September 8, 2005, a Louisiana state trooper spotted Lange on his fire escape. The trooper, accompanied by seven California Highway Patrol officers, then climbed the fire escape and drew his weapon. The trooper [*20] ordered Lange to vacate his residence and accompany the officers to the New Orleans Convention Center. Lange was taken by Army truck to the Convention Center and searched. He was not arrested, and after a brief detention was released and was able to return to his home.

As noted above, a municipality may be held liable under § 1983 when its official policies or customs violate the Constitution. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed.

2d 611 (1978); *see also Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (noting that a plaintiff may establish municipal liability under § 1983 by establishing "[a] persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy."). However, a municipality will not face liability under a respondeat superior liability theory. *Monell*, 436 U.S. at 691. Thus, even if Lange's search and seizure was unconstitutional, the City is not liable unless its customs or policies caused the unconstitutional search and seizure. *Id.* at 690. Although Plaintiffs produced evidence that [*21] the City instructed law enforcement officials to evacuate people from the City, Lange was not evacuated and the record contains no evidence that the City had a policy authorizing law enforcement to unlawfully search and detain people within the City. Plaintiffs have failed to demonstrate the "requisite degree of culpability" and that there exists "a direct causal link" between the municipal action and the alleged rights violation. *See Bryan County v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). To hold the City liable for the unconstitutional actions of the arresting officer - not even a party to the present lawsuit - would be holding the City liable under a respondeat superior theory, which the Supreme Court has explicitly rejected. *Monell*, 436 U.S. at 690-91; *see also Bryan County*, 520 U.S. at 410 ("To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate

decision and the particular injury alleged."). The district court's grant of summary judgment to the City was proper.

The record contains no evidence directly linking Ebbert to the alleged violation of Lange's Fourth Amendment [*22] rights, so the district court was correct to dismiss this claim as well.

* * * *

Therefore, because Plaintiffs failed to demonstrate a constitutional violation, we affirm the district court's grant of summary judgment to all Defendants with respect to Plaintiffs' claims for declaratory and injunctive relief, equal protection, procedural due process, and substantive due process. With respect to Plaintiffs' Fourth Amendment claims, the record contains no evidence that either Reynolds or the Schmalzes were subject to any searches or seizures; they therefore fail to state a constitutional claim and the grant of summary judgment with respect to their Fourth Amendment claim was proper. With respect to Lange's Fourth Amendment claims against the City, summary judgment was proper because Plaintiffs failed to demonstrate that Lange's injury occurred pursuant to a municipal policy or custom. The record contains no evidence linking Ebbert to Lange's Fourth Amendment claim; thus, Lange failed to demonstrate that Ebbert violated his constitutional rights and summary judgment was proper. [5]

5 Because Plaintiffs have stated no cognizable claim against Ebbert, we need not examine whether he is entitled [*23] to qualified immunity.

III. District Court's Denial of Plaintiffs' Motion for a Continuance

Federal Rule of Civil Procedure 56(f) authorizes the district court to grant additional time for discovery when a summary judgment motion has been filed prematurely. "To obtain a continuance of a motion for summary judgment, a party must specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." *Access Telecomm., Inc. v. MCI Telcomms. Corp.*, 197 F.3d 694, 719 (5th Cir. 1999). This Court reviews the district court's denial of a continuance for additional discovery under the abuse of discretion standard and "will affirm that denial unless it is arbitrary or clearly unreasonable." *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 721 (5th Cir. 1995).

We find no abuse of discretion in this case. Plaintiffs argue that additional time for discovery was needed and that the additional discovery would have defeated the summary judgment motion, and cite fourteen areas where such additional discovery is needed. However, in opposing summary judgment, the Plaintiffs failed to even produce that [*24] evidence which was within their control, such as the affidavits or testimony of Reynolds and the Schmalzes. Further, much of the additional evidence requested by Plaintiffs is irrelevant to their claims. Finally, Plaintiffs fail to point to specific instances of material fact that the additional evidence would establish and that would preclude the grant of summary judgment to the Defendants. For these reasons, the district court's decision to deny

Plaintiffs' request for additional discovery was not "arbitrary or clearly unreasonable." *Id.* [6]

6 Plaintiffs also argue that they needed additional time because the Defendants' motion was untimely filed. This argument is meritless, as the docket indicates that Defendants' motion was timely filed on September 12, 2006, fifteen days before the hearing date of September 27, 2006. *See* E.D. La. Local R. 7.2E.

IV. District Court's Denial of Plaintiffs' Motion for Class Certification

Plaintiffs moved to certify two classes of plaintiffs: (1) Plaintiffs Reynolds and Mr. & Mrs. Schmalz sought to be certified as representatives of a class consisting of all persons who resided in unflooded areas of the City and who suffered property loss as a result [*25] of being denied entry to the City after the storm and (2) Plaintiff Lange sought to be certified as a representative of a class consisting of persons who resided in unflooded areas of the City and were illegally arrested or suffered illegal searches and seizures due to the Order. The district court denied this motion. "[T]he district court maintains substantial discretion in determining whether to certify a class action," and this court reviews such a determination only for abuse of discretion. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998).

Plaintiffs sought class certification pursuant to Federal Rule of Civil Procedure 23, under which plaintiff must satisfy four requirements: numerosity, commonality, typicality, and adequate representation. FED. R. CIV. P. 23(a). The district court, after conducting a rigorous analysis of the requirements of Rule 23, found that class

certification was inappropriate because the proposed class definitions were nebulous and because there were not common issues of liability and damages. The district court did not err in this conclusion. It is clear that the individual issues of class members, such as damages, causation, and liability, [*26] would predominate over the common ones. As such, it was not an abuse of discretion for the district court to deny Plaintiffs' motion for class certification.

V. Conclusion

For the reasons set forth above, we AFFIRM the district court's grant of summary judgment to Defendants, AFFIRM the district court's denial of Plaintiffs' motion for a continuance, and AFFIRM the district court's denial of Plaintiffs' motion for class certification.

APPENDIX B – OPINION AND ORDER OF THE UNITED DISTRICT COURT EASTERN DISTRICT OF LOUISIANA DECIDED OCTOBER 10, 2006

JAMES L. REYNOLDS ET AL VERSUS THE CITY OF NEW ORLEANS ET AL, CIVIL ACTION NO: 05-4158 SECTION (J) (1)
UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA
OCTOBER, 10 2006

Before the Court is the **Motion for Judgment on the Pleadings Pursuant to Rule 12(C) or, Alternatively, for Summary Judgment Pursuant to Rule 56** f iled by Defendants the City of New Orleans and the Director of the Office of Emergency Preparedness for the City of New Orleans, Terry Ebbert **(Rec. Doc. 63)**. This motion was opposed and was set for hearing on September 27, 2006. It is now before the Court on the brief s alone.

Having reviewed the memoranda of counsel and applicable law, the Court f inds that no material fact issues are in dispute that preclude summary judgment or, alternatively, the granting of the motion for judgment on the pleadings.

(1) During a September 27, 2005 status conference, counsel for Plaintiff acknowledged that the Mayor of the City of New Orleans, Ray Nagin, had legal authority under state law, La. R.S. 29:727, to "E d] irect and compel the evacuation of all or part of the population from any stricken or threatened area within the boundaries of the parish if he deems this action necessary for mitigation, response, or

recovery measures."

(3) Pursuant to this authority, Mayor Nagin issued an emergency evacuation order on August 28, 2005.Plaintiffs admit that the evacuation order was legal; however, they assert that it was enforced in an unconstitutional manner because of lack of due process of law or lack of equal protection.

(4) Plaintiff James L. Reynolds, Jr. claims that he was forced to evacuate after Hurricane Katrina and, although his home was not flooded, was prevented f rom returning to his home and property. Plaintif f s Howard M. and Lydia Schmalz claim that they evacuated before Hurricane Katrina and were unable to return to their home. These plaintiffs contend that, consequently, they were unable to take appropriate steps to secure their home from additional damage. Plaintif f F. Lange claims that on September 8, 2005, a Louisiana State Police Officer and seven California Highway patrol officers forced him to go with them to the Convention Center despite his objections thereto and despite his statements that he had enough food and water for thirty days. Plaintiff Lange claims that he was allowed to leave the Convention Center later that same day and return to his residence; however, he states that he was afraid to go outside.

(5) For reasons to be explained more fully in a subsequent order, the Court finds that Plaintiffs have failed to allege a deprivation of a constitutional right by Defendants the City of New Orleans or Terry Ebbert.

(6) Even assuming that a violation of a constitutional right did occur, this Court f inds that Ebbert is entitled to qualified immunity.Accordingly,

IT IS ORDERED that **Motion for Judgment on the Pleadings Pursuant to Rule 12(C) or, Alternatively, for Summary Judgment Pursuant to Rule 56 (Rec. Doc. 63)** should be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendants' **Motion for Protective Order (Rec. Doc. 64)** should be and hereby is **DENIED as MOOT.**

IT IS FURTHER ORDERED that Plaintiffs' **Unopposed Ex Parte Motion to Continue Pretrial Conference and Trial on the Merits (Rec. Doc. 79)** should be and hereby is **DENIED as MOOT.**

New Orleans, Louisiana, this the 10 day of October, 2006.

Carl J. Barbier
UNITED STATE DISTRICT COURT

APPENDIX C – U. S. District Court Eastern District of Louisiana (New Orleans) CIVIL DOCKET FOR CASE #: 2:05-cv-04158-CJB-SS (NUMBER 63 TO 65)

09/12/2006	63	MOTION for Judgment on the Pleadings, MOTION for Summary Judgment by New Orleans City, Terry Ebbert. Motion Hearing set for 9/27/2006 09:30 AM before Judge Carl Barbier. (Attachments: # 1 Statement of Contested/Uncontested Facts # 2 Notice of Hearing # 3 Exhibit)(ala) (Entered: 09/15/2006)
09/12/2006	64	MOTION for Protective Order by New Orleans City, Terry Ebbert. Motion Hearing set for 9/27/2006 09:00 AM before Magistrate Judge Sally Shushan. (Attachments: # 1 Memorandum in Support # 2 Notice of Hearing)(ala) (Entered: 09/15/2006)
09/15/2006	62	DOCUMENT STRICKEN-NOTICE to Take Deposition of City of New Orleans, Nagin, Ebbert, Reese, and Landry by all plaintiffs.(Koerner, Louis) Modified on 9/15/2006 (sek,). (Entered: 09/15/2006)

09/15/2006	65	Correction of Docket Entry by Clerk re 62 Notice to Take Deposition; Document has been STRICKEN pursuant to Federal Rule Civil Procedure 5(d). (sek,) (Entered: 09/15/2006)

APPENDIX D – AFFIDAVIT OF JOHN F. LANGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES L. REYNOLDS, JR. and HOWARD M. AND LYDIA SCHMALZ, Individually and on Behalf of All Others Similarly Situated, Plaintiffs	CIVIL ACTION NO. 05-4158(J)(1) JUDGE BARBIER MAGISTRATE: SHUSHAN

VERSUS

THE CITY OF NEW ORLEANS through its Office of Emergency Planning, and TERRY EBERT, Director of the Orleans Parish Office of Emergency Planning, Individually and in His Official Capacity, Defendants

AFFIDAVIT OF JOHN F. LANGE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: John F. Lange, 1007 Jackson Avenue, Apt. 6, New Orleans, LA 70130-5545, who being duly sworn, did depose and say that he had personal knowledge of the following and that the

following is true and correct to the best of his knowledge, information, and belief:

1. Affiant, whose Social Security Number is 185-46-8543, resided at 1007 Jackson Avenue at the time that Hurricane Katrina came through New Orleans and until September 8, 2005 when my person was seized.

2. During the period between August 29, 2005 and September 8, 2005, I had adequate provisions of food and water. My cell phone, 504-722-9162, continued to function throughout the hurricane and through September 8, 2005, so that I was able to communicate with the outside world. I also had a battery-powered radio, which functioned throughout, as well as a flashlight and an adequate supply of batteries.

3. After the hurricane, I had transportation by means of my bicycle. I had no problem with looters or looting.

4. I became aware that there was a mandatory evacuation order that was not, according to the radio, enforceable by law that was entered during the second week after the hurricane.

5. On September 8, 2005 at approximately 9:45 A.M., Louisiana State Police Office Sean (Shawn) Boyd saw me on the balcony of my residence. He was on Constance Street. I told him that I had no drugs and no weapons and asked him, "How can I help."

6. Trooper Boyd did not respond to what I said. Rather, he entered the property at 1007 Jackson Avenue and started up the fire escape. I was standing in a pair of gym shorts and nothing else. Despite this, Trooper Boyd started to draw a weapon, his pistol. He was followed by seven California Highway Patrol officers.

7. I put my hands up in the air and asked the California Highway Patrol Officers to stop Trooper Boyd, because "He lost his little mind."

8. Trooper Boyd continued to approach me, with his gun now holstered, and with rubber gloves on his hands, grabbed my arm and said, "Let's go." I had no shirt, no shoes, and no underwear and did not want to go anywhere.

9. I said, "Why are you arresting me?" Trooper Boyd said, "You are not being arrested, but you can be arrested if you want (which I took to mean if I did not cooperate)."

10. I told him that I could not go anywhere without any clothes on. He told Cal Highway Patrol to watch me, perhaps expecting me to jump off the second floor balcony. He entered my residence, brought me clothes and sandals. He did not bring me my wallet or any identification. He clearly saw no indication of looting, because he did not arrest me. I had to strip off my gym clothes on the balcony in front of everyone in order to get dressed.

11. All eight of them (Boyd and the California Highway Patrol members) escorted me to an Army truck, which was on Jackson Avenue.

12. A news reporter came up to the truck. I yelled to him on camera that I did not need to be evacuated, because I had food and water for 30 days. One of the other twelve or so people in the truck yelled the same thing and added that this area was dry and had never been flooded. He said, "So what, if there is no electricity."

13. The Army truck took me to the New Orleans Morial Convention Center. When I got to the Convention Center, I protested. The military searched me at that point. I did not have any

identification because Trooper Boyd would not allow me to bring any identification, money, or credit/debit cards. I told an Army lieutenant at the Convention Center that what had been done to me was unconstitutional. He said, "Don't use abusive language toward the National Guard and the civilians." I asked whether he was taking away my First Amendments rights too.

14. I asked him whether the Geneva Convention still applied. I told him that I was an honorably discharged Navy veteran. The lieutenant told me that they were trying to help evacuate and not force anybody out. I told him that I was forced onto an Army truck against my will.

15. The Lieutenant said, "You can leave. We are not forcing you. I have to warn you that civilian police will arrest you and take you to the Greyhound bus station (which I knew to be the substitute jail)." I told him that I bet that he would point me out to the police, if I tried to leave, which he denied and did not do.

16. I then left and walked back to 1007 Jackson Avenue, taking a couple bottles of water with me. I was not bothered again, but was afraid to go outside of my property. Although I had to go outside my room because it was so hot, I jumped back in every time that I heard anything coming down the street.

17. On September 9, 2005, I talked to the National Guard. They said that there would be no more forced evacuations, but that they had no idea where to get water or food. They gave me about eight small bottles of water, as I had plenty of food. I got no further help from them.

18. As of the day of this affidavit, I am still living at 1007 Jackson Avenue.

SWORN TO AND SUBSCRIBED

BEFORE ME ON THIS 16TH DAY
JOHN F. LANGE
OF OCTOBER, 2005.

NOTARY PUBLIC

APPENDIX E – MUNICIPAL POLICY OF SEPTEMBER 6, 2005 OF THE MAYOR OF NEW ORLEANS

On September 6, the Mayor of New Orleans issued the following municipal policy:

> Whereas, Hurricane Katrina has caused catastrophic damage to the City of New Orleans, including, without limitation, several breaches in the levee system, loss of power and water service, and the collapse and/or loss of structural integrity of roadways, buildings, and other structures,
>
> Whereas, the above-referenced damage necessitates an immediate and unimpeded recovery effort by the City, the State of Louisiana, and the United States Government,
>
> Whereas, the presence of individuals not specifically engaged by the City, State, or U.S. Government to assist in the remediation and recovery effort would distract, impede, or divert essential resources from the recovery effort,
>
> Now, therefore, I as the Mayor of the City of New Orleans, pursuant to the authority granted by Louisiana Revised Statutes 29:727 and 730.2, do hereby promulgate and issue the following mandatory evacuation order, which shall supercede the Order issued by me on August 28, 2005, which shall remain in effect for thirty days from this date,

unless extended by my order or earlier terminated by my order:

Effective immediately, any public safety officer within the boundaries of the Parish of Orleans, including, without limitation, members of the New Orleans, including, without limitation, members of the New Orleans Police Department, the New Orleans Fire Department, the National Guard and any branch of the U.S. Military, is hereby instructed and authorized to compel the evacuation of all persons from the City of New Orleans, regardless of whether such persons are on private property or do not desire to leave, unless such persons are determined by such public safety officers to be specifically engaged by the City, the State or the U. S. Government in providing assistance in the remediation and recovery effort.

Those persons who are currently located in Algiers on the West Bank side of Orleans Parish are hereby excepted from this Order. Plaintiffs were all residents of New Orleans at the time of Hurricane Katrina who were either prevented from returning to their property or forcibly evacuated under the Order.